

§ N.12 Firearms Offenses

Summary: There are multiple independent ways a firearm offense might affect an immigration case. For more frequent updates on specific offenses, look up the offense in the *California Quick Reference Chart*.¹

- **Deportation ground for conviction of an offense involving a firearm or destructive device.** Because many California firearms offenses do not match the federal definition of firearm, they do not fall within this deportation ground. However, some convictions will make a person deportable and require more careful defense strategies. For further discussion of this deportation ground, see Section A below at page 3. For removal defense arguments on other federally defined firearms, see Section E below at page 12.
- **Aggravated felony for conviction of certain offenses involving federally-defined firearms, ammunition, or destructive devices.** Some state convictions, such as CA P.C. § 30305 and 33215, qualify as firearms “aggravated felonies,” which carry the most serious immigration consequences. Fortunately, only a few California offenses match the aggravated felony definitions. See discussion at Section B below on page 6.
- **Other removal grounds.** Some state firearms offenses that go beyond possession may trigger other removal grounds. They might be deemed a “crime of violence” or a “crime involving moral turpitude.” Here, the technical definition of firearm is not a defense. See Section C below on page 8.
- **Bars to relief.** Immigration “relief” refers to the range of lawful status or other immigration benefits for which noncitizens can apply, for example, DACA, asylum, and lawful permanent residency. Each form of relief may have different types of convictions that are bars. For example, DACA is barred by conviction of any firearms offense, and a violent firearms offense may be a “particularly serious crime” that bars asylum. Further, *any* offense involving threat or assault with a firearm is a serious negative discretionary factor in an application for relief. See Section D below on page 9.

NOTE: This resource provides strategies for mitigating and avoiding certain immigration consequences in California firearms and weapons cases. It is not a replacement for individualized legal advice and client representation. Federal law and California law require criminal defense lawyers to provide individualized, client-specific advice and representation on immigration issues for noncitizen defendants. California criminal law requires defense counsel to “provide accurate and affirmative advice about the immigration consequences of a proposed disposition” and, where appropriate, to “defend against those consequences.” See Penal Code 1016.3(a). To do this, the defender must understand and explain which offenses would harm each defendant based on their own situation, and if necessary, try to obtain an alternative disposition in the case that would cause no, or at least less, immigration damage. Defenders who are not experts in immigration and crimes should consult with an expert for each client. The purpose of this advisory is to help defenders understand the basics, so that they can more easily engage with the expert, advise the client, and if necessary, argue the issue to a prosecutor or judge.

For additional resources to assist with individualized representation, please visit www.ilrc.org/crimes and www.ilrc.org/crimes-summaries.

¹ Criminal defenders and immigration advocates can register for this free resource at <https://calchart.ilrc.org/registration/>.

Overview: Defending a Non-U.S. citizen Charged with a Firearms Offense

When defending a non-U.S. citizen charged with an offense that has firearms, ammunition, or explosives as an element, defenders should prioritize the following strategies.

The first step must be to assess your client's immigration status, options, and priorities. Firearms-type offenses implicate different immigration rules that vary depending on the details of the person's immigration case. This means that some clients can be okay with a conviction that others must absolutely avoid. Firearms offenses can be relatively safe for some people and catastrophic for others, depending on the person's case and objectives. For information about how to analyze the client's case and identify defense goals, see ILRC, *How to Analyze a Crim/Imm Case* (2023).²

With that in mind, here are the key immigration concerns about firearms offenses and what to look out for.

1. Avoid an **aggravated felony** relating to firearms, ammunition, or explosive devices. Aggravated felonies carry the greatest immigration penalties and bar almost every form of relief from deportation. Fortunately, only a few California offenses will qualify; these include felon in possession of ammunition and the sale of certain kinds of firearms. Additionally, any offense that meets the technical definition of a "crime of violence" (COV) where a sentence of a year or more is imposed will be an aggravated felony.³ See further discussion at Sections A and B, below.
2. Avoid a conviction that matches the **firearms deportability** ground – almost any firearms conviction, if it matches the federal definition of firearm, will cost a person their green card, and will also bar an undocumented person from getting non-LPR cancellation of removal. But as discussed below in Section A, many California firearms crimes do not match the federal definition and thus do not trigger these consequences.
3. Any firearms conviction is a bar to **DACA**, whether or not it matches the federal firearms definition.
4. Watch out for other removal grounds that may come up in firearms cases, such as **crimes involving moral turpitude** (CIMT) and **crimes of domestic violence**. Many violent offenses will be considered CIMTs, and it doesn't matter whether the firearm meets the federal firearm definition. CIMTs trigger several possible penalties in immigration law, in some cases for just a single conviction. Use the California Chart to see if a particular offense is a CIMT or DV offense.⁴
5. Both **asylum and withholding of removal** are barred by a conviction for a "particularly serious crime," which requires a fact-specific analysis based on the details of the incident, not on the statute of conviction. Criminal defense attorneys representing asylum or

² Available at www.ilrc.org/crimes-summaries.

³ "Crimes of violence" are defined for immigration purposes at 8 USC § 16(a), and they will become aggravated felonies if a sentence of a year or more is imposed under 8 U.S.C. § 1101(a)(43)(F). Check the *California Chart* to see if specific offenses are crimes of violence. Note that the year or more in jail includes suspended sentence as well as any subsequent time on a probation violation. See ILRC, [§ N.4 California Sentences and Immigration \(November 2020\)](http://www.ilrc.org/crimes-summaries) at www.ilrc.org/crimes-summaries.

⁴ For more details on how CIMTs and DV offenses affect an immigration case, see N.7 [All Those Rules About Crimes Involving Moral Turpitude \(June 2021\)](http://www.ilrc.org/crimes-summaries) and N.9 [Case Update: The Domestic Violence Deportation Ground \(March 2022\)](http://www.ilrc.org/crimes-summaries) at www.ilrc.org/crimes-summaries.

withholding of removal seekers should try to avoid firearms-related offenses, and if this is not possible, should minimize evidence of violence in the record.

6. **Discretion** in immigration applications: Almost all undocumented people, and many immigrants with some lawful status, someday will have to file a discretionary immigration application. Any offense involving threatened or actual violence, and perhaps some firearm possession offenses, will affect their case.

Example: Lawful Permanent Resident (LPR) Mia and Nico, who is undocumented, are co-defendants charged with various firearms offenses. As discussed above, the difference in their immigration status significantly affects their strategy in defending against firearms charges.

- As a permanent resident, **Mia** wants to avoid a conviction that falls under the firearms deportation ground, and especially wants to avoid an aggravated felony, because either of those would jeopardize her green card. She also wants to avoid a CIMT, which could affect her ability to travel and her eligibility for citizenship in the near future. Mia is also concerned about how the case will look on discretion if she applies for citizenship.
- **Nico** also wants to avoid the firearms deportation ground and an aggravated felony, since they will bar him from non-LPR-cancellation of removal. However, he recently married a U.S. citizen, so he is more focused on avoiding a CIMT conviction that would make him inadmissible and prevent him from getting status through his wife. Nico also needs to make sure that he considers which offenses will look the worst in terms of discretion, for both adjustment of status and non-LPR-cancellation.

For more details about the different classes of immigrants subject to different removal grounds, see Section D. below.

Specific Immigration Consequences for Offenses Relating to “Firearms”

As discussed above, there are various immigration consequences for firearms-related convictions, including the firearms deportation ground, aggravated felonies, possible CIMTs, and other bars to relief. In California, an essential aspect of defending clients with firearms charges is understanding how the categorical approach applies to create what is usually called the “antique firearms exception.”

A. Firearms Deportation Ground

This section will explain the antique firearms exception, the firearms deportation ground, and identify some common California offenses that avoid this removal ground.⁵ Note that in 2012, California substantially reorganized and renumbered many of its firearms and weapons penal codes. These were not changes in the law so much as changes in the statutory numbering system.⁶

⁵ *Destructive devices*. Both the firearm deportability ground and the aggravated felony for firearms trafficking also include “destructive devices” as defined in 18 U.S.C. § 921(a)(4), but analysis of offenses that would amount to destructive devices are beyond the scope of this Note.

⁶ Two online guides to how the offenses were reorganized are available at:
<http://www.clrc.ca.gov/pub/Misc-Report/M300-Tables/ReverseDispoTable.pdf>
<http://www.clrc.ca.gov/pub/Misc-Report/M300-Tables/UpdatedDispoTable.pdf>

1. Antique Firearm Exception

Many California firearms offenses do not count as firearms offenses for immigration purposes. This is because of the categorical approach, which compares the elements of the California conviction to the elements of the federal removal ground.⁷ If the definition of “firearm” in a state offense is broader than the federal definition, conviction of the state offense will not be a ground of removal. The person will thus avoid two immigration penalties: it will not be a deportable firearms offense under INA 237(a)(2)(E), or a firearms aggravated felony under INA 101(a)(43). This is the case for many California firearms offenses.

To be a deportable firearm offense or firearm aggravated felony, the offense must match the federal, “generic” definition of firearm. This definition is provided by the immigration statute, which in turn refers to the definition of firearm in 18 U.S.C. § 921(a).⁸ Section 921(a)(3) provides the applicable definition of the term “firearm” and states that “[s]uch term does not include an antique firearm.”⁹ This means that under federal law, antique firearms convictions don’t count; they are not grounds for deportation. Further, it means that state criminal statutes that include antique firearms in their gun laws are overbroad relative to the federal definition. If the statutes are indivisible with respect to what weapon or firearm was used, for example if they simply proscribe “firearms” and the definition of firearm includes antiques, then no conviction of the offense will come within the firearms deportation ground or aggravated felony categories.

Many California gun statutes *include* antique firearms, because they employ the definition of firearm in CA P.C. §16520(a), which does not distinguish between modern and antique guns.¹⁰ Thus, these California statutes are overbroad relative to the federal definition that excludes antiques. Moreover, most California firearm statutes are also indivisible as to the type of gun involved. The term “firearm” is a single word that does not divide into multiple offenses. As a result, a person can be convicted of a firearms offense under California law that does not qualify as a deportable or aggravated felony firearms offense.¹¹

Example: LPR Lena was convicted of carrying a concealed firearm under CA P.C. § 25400, which uses the definition of firearm at CA P.C. § 16520(a). Because this definition includes antique firearms, the minimum conduct required for guilt includes an antique firearm. That means that Lena’s conviction is overbroad relative to the federal deportation ground. Because it is also not divisible as to what kind of firearm was involved, it cannot trigger the firearms deportation ground or aggravated felony categories. Whether Lena herself used an antique firearm is not relevant, as long as the elements of the offense can be satisfied by an antique firearm.

⁷ For more background on the categorical approach, see § N.3 *How to Use the Categorical Approach Now*, at https://www.ilrc.org/sites/default/files/resources/note_2021_categorical_approach.pdf.

⁸ 8 U.S.C. § 1227(a)(2)(C). See also *United States v. Aguilera-Rios*, 769 F.3d 626 (9th Cir. 2014).

⁹ 18 U.S.C. § 921(a)(3) states in full: “The term “firearm” means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. *Such term does not include an antique firearm.*” (emphasis added). An antique firearm is defined as one made in 1898 or before, and certain replicas. 18 U.S.C. § 921(a)(16).

¹⁰ The definition of firearm at CA Pen C § 16520(a) (formerly § 12001(b)) does not exclude antique firearms, so no conviction of an offense that uses the § 16520(a) definition triggers the firearms deportation ground or is a firearm aggravated felony. *United States v. Aguilera-Rios*, 769 F.3d 626 (9th Cir. 2014); *Medina-Lara v. Holder*, 771 F.3d 1106, 1116 (9th Cir. 2014) (“We hold that *Aguilera-Rios* applies to any California statute based on the definition of ‘firearm’ formerly appearing at § 12001(b).”)

¹¹ See *United States v. Aguilera-Rios*, 769 F.3d 626 (9th Cir. 2014).

Antique Firearms Statutes (CA Offenses that Include Non-Federally-Defined Firearms):

The following are some common California firearms offenses that include antique firearms, which means that no conviction will be a deportable firearms offense or firearms aggravated felony:

- § 245(a)(2) *assault with a firearm*
- § 246 *discharge a firearm at an inhabited dwelling*
- § 417(a)(2) *exhibit firearm in a rude or threatening manner*
- § 602(l)(4) *discharge firearm*
- § 12022 *sentence enhancement for felony committed while armed with firearm*
- § 17500 *possess deadly weapon with intent to assault*
- § 25400 *carry concealed firearm*
- § 25850 *carry loaded firearm in public*
- § 27500 *sell or deliver firearm to prohibited person*
- § 29800 *felon/addict in possession of a firearm*
- § 29805 *misdemeanant in possession of a firearm*
- § 29815 *possess/own/etc. firearm in violation of probation condition*

Note that while the above offenses do not come within the firearms grounds, **they still can trigger other immigration penalties.** For example, defenders must assume that CA P.C. 245(a)(2) is a COV and CIMT.¹² Depending on the offense, adding an enhancement under P.C. 12022 may also cause the offense to be a COV or CIMT. Be sure to look each offense up in the *Chart* to find its full impact.

2. California Statutes that Match the Federal Firearm Definition.

Other California offenses do involve federally-defined firearms, for various reasons. Some offenses specifically exclude antique firearms from the definition of what weapons are proscribed. These are enumerated at CA P.C. § 16520(d), which provides a specific list of offenses for which the term “firearm” does not include antiques.¹³ Additionally, ‘generally prohibited weapons’ under § 16590 are also statutorily defined as excluding antiques.¹⁴

Some of the more common of these offenses are CA P.C. § 26350 (openly carrying unloaded handgun), and CA P.C. § 33215 (possess/lend/etc. a short-barreled rifle or shotgun).¹⁵ As a practical matter we also assume that some offenses, such as taking a firearm from a police officer, P.C. § 148(c) and (d), do not involve antique firearms. It is important to avoid convictions under these sections and negotiate for counts that are protected by the antique-firearms rule. However,

¹² *But see United States v. Gomez*, 115 F.4th 987 (9th Cir. 2024) (245(a) not a COV because it can be committed with reckless men rea). However, *en banc* review is pending and this ruling may be overturned.

¹³ **CA P.C. § 16520(d) lists the following offenses:** § 16730; § 16550; § 16960; § 17310 § 23920(b); § 25135; §§ 26350 – 26392; §§ 26400 – 26406; §§ 26500 - 26588; §§ 26700 - 26915; § 27510; § 27530; § 27540; § 27545; §§ 27555 - 27585; §§ 29010 - 29150; and § 29180.

¹⁴ See CA P.C. § 17700. CA P.C. §16590 lists many weapons, including, among others: a cane gun (§ 24410), a firearm that is not immediately recognizable as a firearm (§ 24510), a large-capacity magazine (§ 32310), an unconventional pistol (§ 31500), a short-barreled rifle or short-barreled shotgun (§ 33215), an undetectable firearm (§ 24610), a wallet gun (§ 24710), and a zip gun (§ 33600).

¹⁵ See CA P.C. §§ 16590, 17700.

to explore arguments that these statutes still might be overbroad compared to the federal removal ground, see Section E below. At the same time, it is always essential to consider other removal grounds that might be triggered, such as CIMTs or crimes of domestic violence.

3. Specific Pleadings Matter for Divisible Statutes

Just as in criminal proceedings, there are burdens of proof in immigration proceedings. To deport someone with status, ICE must prove that the person has a conviction that makes them deportable. But in cases involving an applicant seeking immigration relief, the immigrant bears the burden of showing that their conviction is not a bar to the benefit they seek. In March 2021, the Supreme Court held in *Pereida v. Wilkinson*, that when a criminal statute is divisible, an immigrant who bears the burden of proving eligibility must show that they were not convicted of an offense that bars relief.¹⁶ A vague record of conviction that refers to both removable and non-removable conduct will not be enough for the immigrant to show eligibility. The upshot is that in cases involving a divisible statute, defenders must be careful to create a specific plea to a “good” offense, rather than creating a record that is vague on key points.

However, very few California firearms statutes are divisible. The term firearm is a single word that is defined in CA P.C. § 16520(a), and there is no possible division between modern and antique firearms in that definition. Other statutes that penalize specific weapons and do not include antique firearms are arguably overbroad and indivisible as well; see Section E. As a result, the need to clearly specify which specific acts a defendant was or was not convicted of under a firearms charge may be rare. Nonetheless, when handling charges involving firearm *sales* it is essential to avoid pleading to sale of any non-antique firearm.

Note: Be careful about relying on caselaw from before 2016 to determine whether an offense is divisible. *Mathis v. United States* clarified that many statutes that may have been considered divisible in the past were actually just describing different *means* of committing the crime, not different elements. See *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016). So many statutes previously interpreted to be divisible should be reconsidered under *Mathis*. For further discussion of *Pereida* and burdens of proof, see § N.3 *How to Use the Categorical Approach Now*.

B. Firearms-Related Aggravated Felonies

An aggravated felony is a ground of deportation and a bar to nearly all forms of relief. Trafficking in firearms (when it meets the federal definition) is an aggravated felony.¹⁷ Additionally, possessing, receiving, or transporting firearms or ammunition by certain groups of people, including undocumented immigrants and people with prior felony convictions, is an aggravated felony.¹⁸ Finally, remember that a “crime of violence” with a sentence of a year or more imposed, is also an aggravated felony.

Although the firearms and ammunition related aggravated felony grounds are quite broad and complicated, we really only have two types of aggravated felonies to worry about in California:

- 1) *Sales/trafficking* of particular firearms that meet the definition of federal firearms, such as those referenced in CA P.C. § 16520(d); and
- 2) Felon in possession of *ammunition*, as in CA P.C. § 30305.

¹⁶ *Pereida v. Wilkinson*, 592 U.S. 224 (2021).

¹⁷ One California offense that can involve sale but does not meet the federal definition of firearm is CA P.C. § 17500. There is some risk that it could be a CIMT, however.

¹⁸ 8 U.S.C. § 1101(a)(43)(E)(ii), which points to, inter alia, 18 U.S.C. § 922(g).

Most other CA offenses that could potentially match the aggravated felony grounds all involve firearms that don't match the federal definition. Meanwhile, the California offenses that do not benefit from the antique-firearms rule still lack the additional element of the defendant being within the enumerated groups of people (undocumented immigrants, prior felony, drug user or addict, etc.) that would make them a match for the aggravated felony ground. However, they still fall within the firearms deportation ground (unless a court upholds the arguments laid out below in Section E).

1. Sales Of Certain Firearms.

Under California law, watch out for sale of certain firearms *that don't include antique firearms* (for example, sale of a short-barreled rifle under CA P.C. § 33215¹⁹ or a machine gun under CA P.C. § 32525). However, sale of firearms that are defined in CA P.C. § 16520(a) will not be aggravated felonies because they are overbroad as firearms.

More generally, the definition of an aggravated felony includes a state felony that matches all the elements of certain federal felonies involving firearms, ammunition, and explosive devices.²⁰ These are either sales, or possession/transport by specified prohibited persons. This catches very few California firearms offenses, because of the difference in how California and federal law define firearms, and because of the focus on specific categories of people specified under federal law.

While being a felon in possession of a firearm is an aggravated felony, it is not under California law (CA P.C. §29800), because the definition of "firearm" does not match. Same with CA P.C. § 25400(c)(1). In other words, the same California firearms offenses that do not match the deportability ground because they include antiques will also avoid being aggravated felonies, even if they involve sales/trafficking or possession by an undocumented immigrant.

Moreover, when it comes to non-antique firearms offenses, mere possession, without a sale or trafficking charge, is only an aggravated felony if the offense specifically applies to certain groups of people identified in the aggravated felony ground (undocumented immigrants, people with felony convictions, etc.). But very few, if any, California offenses that meet the federal definition of firearm also include these prohibitions on enumerated categories of people. Therefore, possession of weapons that are specifically defined as excluding antiques will trigger the firearms deportation ground, but not the aggravated felony ground.

2. Felon in Possession of Ammunition

Watch out for CA P.C. § 30305, felon in possession of *ammunition*. Being a felon in possession of ammunition does match all elements of the federal aggravated felony, so that is quite dangerous.

¹⁹ While various short-barreled rifles and shotguns were manufactured long ago and might include antiques, § 33215 specifically excludes antiques as weapons punishable under this offense.

²⁰ *U.S. v. Aguilera-Rios*, 769 F.3d 626 (9th Cir. 2014); *Medina-Lara v. Holder*, 771 F.3d 1106, 1116 (9th Cir. 2014) ("We hold that *Aguilera-Rios* applies to any California statute based on the definition of 'firearm' formerly appearing at § 12001(b)."). See 8 USC § 1101(a)(43)(C) (illicit trafficking in firearms or destructive devices) and § 1101(a)(43)(E) (offenses "described in" certain federal firearm criminal statutes, including being a felon, addict, or undocumented immigrant in possession of a firearm or ammunition).

The underlying aggravated felony definition here involves **both** the possession of ammunition **and** commission of the offense by specific people, such as undocumented immigrants and people with felony convictions.²¹ So CA P.C. § 32310, which prohibits manufacture, sale, possession, etc. of a large capacity magazine by any person, is unlike P.C. § 30305, because it does not have the element of the defendant being an undocumented immigrant, drug addict, or other category of person to match the aggravated felony ground.

Example: LPR Lena got another firearm conviction, this time for being a felon/addict in possession of ammunition under CA P.C. § 30305.²² Under INA § 101(a)(43)(E), it is an aggravated felony to ship, transport, possess, or receive a firearm if you have previously been convicted of a felony. Lena strategically reduces her prior §25400 conviction to a misdemeanor under CA P.C. §17(b) and is thus able to negotiate a specific plea to § 30305 as being a *misdemeanant* in possession of ammunition, which should protect her conviction from being found an aggravated felony.²³

C. COVs, CIMTs and Other Immigration Consequences of Firearms-Related Convictions

Some firearms offenses, even if they are not deportable firearm convictions or aggravated felonies, may be crimes involving moral turpitude or crimes of domestic violence. Here it does not matter whether the firearm matches the federal definition. For example, P.C. § 417.4 – exhibiting an imitation firearm in a threatening manner, is both a crime of violence and a crime involving moral turpitude, even though it does not involve an actual firearm and is not a deportable firearms offense.

Whether or not it includes antique firearms, a firearm offense that is a crime of violence must avoid a year or more sentence or it becomes an aggravated felony.²⁴ But even without a year sentence, it could be a deportable crime of domestic violence if the defendant and victim had a domestic relationship.²⁵ A crime of domestic violence must also be a crime of violence, which

²¹ 18 U.S.C. § 922(g). Shipping, transporting, possessing, or receiving **ammunition** (including a magazine) by any of various groups of people (incl. felon, fugitive, drug user or addict, undocumented immigrant, defendant under felony indictment) is an aggravated felony. Additionally, receiving, possessing, concealing, selling or disposing of *stolen* ammunition is an aggravated felony. 18 U.S.C. § 922(j). In California, a magazine is within the definition of ammunition, but blanks do not count. *People v. Bay* (2019) 40 Cal.App.5th 126, 131–132.) (“[A]mmunition” is defined by statute as including “any bullet, cartridge, magazine, clip, speed loader, autoloader, ammunition feeding device, or projectile capable of being fired from a firearm with a deadly consequence. ‘Ammunition’ does not include blanks.”)

²² See CA P.C. § 29800(a)(1): Any person who has been convicted of a felony under the laws of the United States, the State of California, or any other state, government, or country, or of an offense enumerated in subdivision (a), (b), or (d) of Section 23515, or who is addicted to the use of any narcotic drug, and who owns, purchases, receives, or has in possession or under custody or control any firearm is guilty of a felony.

²³ Another possibility to avoid an aggravated felony would be to plead to owning, rather than possessing, ammunition. See *U.S. v. Pargas-Gonzalez*, 2012 WL 424360, No. 11CR03120 (S.D. Cal. Feb. 9, 2012) (concluding that former CA P.C. § 12021(a) is not categorically an aggravated felony as an analog to 18 USC § 922(g)(1) (felon in possession) because § 12021 is broader in that it covers mere ownership of guns by felons), citing *U.S. v. Casterline*, 103 F.3d 76, 78 (9th Cir. 1996), in which the court reversed conviction under § 922(g)(1) where defendant owned a firearm but was not in possession at the alleged time.

²⁴ For more details on sentences and immigration consequences, see *California Sentences and Immigration*, <https://www.ilrc.org/resources/california-sentences-and-immigration>.

²⁵ Keeping the victim’s identity out of the record is not enough to protect a client in this situation, because the underlying relationship is subject to the “circumstance-specific approach” that allows DHS to consider

means it must involve the use, attempted use, or threatened use of force against another person or property.²⁶

Simply possessing a weapon is not a crime of violence or a crime involving moral turpitude.²⁷ Discharging a firearm should not necessarily be a crime of violence, such as in P.C. § 26100(a) or (b) or § 246.3, which lack the knowing or intentional mens rea required for a crime of violence. However, these offenses could possibly be charged as CIMTs, although they arguably still lack sufficient mens rea.²⁸

D. Who is Harmed by a Firearm Conviction?

In representing noncitizen defendants, it is important to understand when the grounds of deportability and inadmissibility apply. Generally, noncitizens who have been admitted with lawful status are subject to grounds of *deportability*, while people applying for status are subject to grounds of *inadmissibility*. Additionally, applicants for immigration relief must show that they are not otherwise barred from the relief they are seeking, due to a criminal offense.

Deportability: A lawful permanent resident, refugee, or someone who has been admitted on another kind of visa or status can be put in removal proceedings if they become deportable. To maintain their legal status, this client needs to avoid a deportable conviction – e.g., a firearms offense or aggravated felony. Additionally, two CIMT convictions anytime after admission (which did not arise from the same incident), or one CIMT committed within five years after admission that has a potential sentence of at least one year, will cause deportability.²⁹ ICE has the burden of proving that a conviction really is a deportable offense based on the elements of the crime that is either identified by the statute or, in the case of a divisible statute, by reference to the record of conviction. See §N.3 *How to Use the Categorical Approach Now* (2021) at www.ilrc.org/resources/california-crimes-summaries. However, grounds of deportability can also operate as bars to relief, as described below, in which case the applicant has the burden of proving that they do not have a conviction for a deportable offense.

Inadmissibility: There is no “firearms,” or even “aggravated felony” ground of inadmissibility. Therefore, a firearms conviction *per se* will not bar lawful immigration status, e.g., stop someone from immigrating with a family visa or qualifying for a non-immigrant visa. But some firearms-

any relevant and probative evidence. Previous Ninth Circuit case law said that the record of conviction must conclusively prove the relationship. *Tokatly v. Ashcroft*, 371 F.3d 613 (9th Cir. 2004). The BIA disagreed and ruled that the ‘circumstance-specific’ test applies. *Matter of H. Estrada*, 26 I&N Dec 749 (BIA 2016). The Ninth Circuit has not explicitly adopted the BIA’s test or overruled its own decision in *Tokatly*, but after the Supreme Court’s decision overruling *Chevron* deference in *Loper Bright Enterprises v. Raimondo*, 144 S.Ct. 2244 (2024), the Ninth Circuit possibly may not defer to the BIA. For more about crimes of domestic violence in immigration law, see Note § 9A, [ILRC, 2022 Case Update: The Domestic Violence Deportation Ground \(March 2022\)](#).

²⁶ 18 U.S.C. § 16(a).

²⁷ While older decisions held that felony possession of certain weapons, such as a sawed-off shotgun, were crimes of violence under 18 USC §16(b), these decisions were abrogated by the Supreme Court’s holding that 16(b) is void for vagueness. *Sessions v. Dimaya*, 584 U.S. 148 (2018). See also *Matter of Granados*, 16 I&N 726 (BIA 1979) (possession of sawed-off shotgun is not a CIMT).

²⁸ See *Borden v. United States*, 141 S.Ct. 1817 (2021) (holding that recklessness is not enough specific intent for a crime of violence); *but see United States v. Draper*, 84 F.4th 797 (9th Cir. 2023) (voluntary manslaughter is a crime of violence because it involves a mens rea of a depraved heart or extreme recklessness.) CA P.C. § 246.3 involves gross negligence.

²⁹ 8 USC § 1227(a)(2)(A). See § N.7 *Crimes Involving Moral Turpitude*.

related offenses may be CIMTs and cause inadmissibility under that ground, unless they fall within the youthful offender or petty offense exceptions.³⁰ In some cases a waiver of CIMT inadmissibility may be available, although they are discretionary and can be hard to get without many positive equities.³¹

Bars to relief: There are bars to obtaining status or relief that vary depending on the type of relief sought. Even though they are not a ground of inadmissibility, firearms-related convictions can separately bar certain relief, either because they are separately inadmissible offenses under other grounds (such as the CIMT ground), or because they independently bar relief by reference to the deportability provision. Firearm offenses will also weigh heavily against clients seeking discretionary relief such as asylum or adjustment of status. See online resources for more information on these forms of relief.³²

- **Asylum** – A “particularly serious crime” is a bar to asylum. All aggravated felonies are per se considered to be particularly serious crimes for asylum. Otherwise, whether an offense is a particularly serious crime is not a categorical analysis, but a fact-based determination based on the totality of the circumstances underlying the offense. Firearm offenses, especially if they involve any threat or use of violence, are very likely to be found to be particularly serious crimes, whether or not the firearm matches the federal definition.
- **Withholding of Removal** – A particularly serious crime is a bar to withholding, but it is defined differently from asylum. For withholding, an aggravated felony with 5 or more years sentence (or multiple aggravated felonies with aggregate 5 years or more sentence) is a per se particularly serious crime. Other convictions are reviewed on the same fact-based determination as for asylum, taking into account the totality of the circumstances underlying the offense.
- **Non-LPR cancellation of removal** - Both “10-year” cancellation of removal for non-permanent residents and VAWA cancellation of removal for non-permanent residents, are barred by a deportable firearm conviction, as well as any aggravated felony. Additionally, spending 180 days or more in jail during the good moral character period, regardless of the type of conviction, makes a person ineligible for this relief.
- **LPR cancellation** – an aggravated felony is a bar to LPR cancellation. But a deportable firearm offense is not. Additionally, being deportable under the firearms ground does not automatically “stop the clock” for the seven years required. However, a firearm offense that is also a CIMT or a controlled substance (such as CA P.C. § 11370.1) would stop the clock.³³

³⁰ For more about these exceptions and the other immigration consequences of CIMTs, see §N.7 *Crimes Involving Moral Turpitude*, www.ilrc.org/resources/california-crimes-summaries. See §N.7A *Also All Those Rules About Crimes Involving Moral Turpitude*.

³¹ Similarly, watch out for gang allegations or drug sale charges that accompany a firearms conviction which could provide additional conduct-based grounds of inadmissibility based on national security concerns or reason to believe that a person has been involved in drug trafficking.

³² ILRC, §N.17 *Immigration Relief Toolkit* (Aug. 2018, 2024 forthcoming) and §N.17a *Immigration Relief Chart* (Dec. 2021), <https://www.ilrc.org/resources/california-crimes-summaries>.

³³ For more about LPR-cancellation and the seven-year “clock,” see ILRC, *Eligibility for Relief: Cancellation of Removal for Permanent Residents*, 8 U.S.C. § 1229b(a), Dec. 2020, available at <https://www.ilrc.org/resources/eligibility-relief-cancellation-removal-permanent-residents-ina-%C2%A7-240aa>.

- **TPS** – any felony or two misdemeanor convictions is a bar to TPS. A single misdemeanor firearm conviction will not prevent someone from qualifying for TPS, even if it does not meet the antique firearms exception. However, an aggravated felony is also a bar to TPS.³⁴
- **DACA** - conviction of any firearm offense is a bar to DACA eligibility or renewal. This is not subject to a categorical analysis, so USCIS may interpret firearm broadly. The fact that a firearm does not meet the federal definition will not help a DACA applicant. We assume that ammunition convictions will also bar DACA under this rule.
- **212(h) waiver** – waives certain criminal grounds of inadmissibility for people applying for permanent residence or returning LPRs. This waiver only applies to grounds of inadmissibility, so it will help with firearms convictions where the offense is a CIMT or type of inadmissible offense.³⁵
- **212(c) relief** – a repealed provision that allows an LPR to retain their green card after conviction/s of various deportable offenses, including aggravated felonies, if the convictions occurred before April 24, 1996. (There is an exception for one or more aggravated felony conviction/s after November 29, 1990, if the person served a total of five years in prison for the offense/s.)³⁶
- **Naturalization** – requires LPR status for 3 or 5 years, plus good moral character. An aggravated felony is a permanent bar to good moral character and thereby naturalization.³⁷ A firearm conviction, even if it meets the deportation ground, is not a bar to showing good moral character. However, the applicant would need expert immigration advice before applying to naturalize while deportable, because the naturalization application could be denied and the person referred to removal proceedings. Additionally, spending 180 days or more in jail during the good moral character period will make the person ineligible for naturalization.
- **U visa** – almost any ground of inadmissibility can be waived, and deportability grounds don't apply. However, both U visa grants and U-adjustment are discretionary, and firearm convictions are likely to trigger discretionary denials.
- **T visa** - almost any ground of inadmissibility can be waived, but requires extraordinary circumstances if the crime was “violent or dangerous,” unless it was caused by or incident to the trafficking. Deportability grounds don't apply since this is an admission, but good moral character grounds during the T visa period are also required at the time of adjustment.
- **SIJS** – there are no criminal bars to getting Special Immigrant Juvenile Status, but when the person applies for a green card based on that status, they must be admissible or qualify for a 212(h) waiver. Firearm convictions are not a bar to SIJS, but could require a waiver if they are also a CIMT.

Discretion: While firearm offenses, even aggravated felonies, are not grounds of inadmissibility, they can weigh heavily against an immigrant seeking discretionary relief, including asylum, cancellation of removal, U visas, adjustment of status, and naturalization. For this reason, even if

³⁴ See ILRC, The Impact of Crimes on TPS Eligibility, April 2023, <https://www.ilrc.org/resources/community/impact-crimes-tps-eligibility>.

³⁵ See 8 U.S.C. § 1182(h). See also ILRC, Eligibility for Relief: Waivers Under § 212(h) (January 2020), <https://www.ilrc.org/resources/eligibility-relief-waivers-under-ina-%C2%A7-212h>.

³⁶ See 8 U.S.C. § 1182(c).

³⁷ Unless the conviction was before November 29, 1990.

a plea will avoid grounds of inadmissibility or bars to relief, defenders should try to keep bad facts out of the record.

Example: Aki is undocumented and is currently fighting removal proceedings. He has applied for non-LPR cancellation of removal. He is charged with felony CA P.C. § 246 - shooting at an inhabited building, and § 25850 – carrying a loaded firearm. Aki needs to avoid a conviction that is a ground of inadmissibility or deportability in order to remain eligible for cancellation. Both of these offenses use the California definition of firearm that includes antiques, so they are not deportable firearm convictions. Section 25850 does not trigger any other removal grounds, but section 246 is probably a CIMT.³⁸ If Aki can avoid a § 246 conviction, he could remain eligible for cancellation – but he must also avoid spending more than 180 days in jail as a result of his criminal convictions. Even if Aki succeeds in avoiding all removal grounds, the immigration judge can still deny cancellation as a matter of discretion. Aki will need to show very strong mitigating factors and rehabilitation in immigration court to win his case.

E. Defending Charges Involving Firearms

Some firearm offenses in California specifically exclude antique firearms in their definition, specifically those enumerated in CA P.C. § 16520(d).³⁹ As a result, under the categorical analysis of those statutes, the definition of the weapons, as far as we know, is not overbroad. But don't give up yet.

1. Plead instead to an offense that uses the definition at CA Pen § 16520(a), which includes antique firearms. This is safer. For firearms sales, try CA P.C. § 27500.
2. If you can't get into a safe firearm definition, look at the verbs: what are the elements of conduct proscribed – does the minimum conduct (the *behavior* with the firearm) match the deportation grounds? Are they possibly overbroad? Can you plead specifically to giving or lending without remuneration?

³⁸ While there is no case on point, an offense with an element of recklessness has been held to be a CIMT if it has as an element the imminent risk of death or injury. *Matter of Leal*, 26 I&N Dec. 20 (BIA 2012). That definition may fit CA P.C. § 246.

³⁹ CA Pen C §16520(d) enumerates the sections that exclude antique firearms:

- (1) Section 16730 - involving the limit on legal firearm transactions
- (2) Section 16550 - involving firearm transaction records
- (3) Section 16960 - defining 'operation of law' for purposes of firearm licenses
- (4) Section 17310 - defining 'used firearms'
- (5) Section 23920(b) - prohibiting possession of firearms without valid serial numbers
- (6) Section 25135 - involving sales of tangible property
- (7) Chapter 6 (commencing with Section 26350) of Division 5 of Title 4 – openly carrying an unloaded handgun
- (8) Chapter 7 (commencing with Section 26400) of Division 5 of Title 4 – carrying an unloaded firearm other than a handgun
- (9) Sections 26500 to 26588, inclusive - involving license requirements for sale, lease or transport of firearms
- (10) Sections 26700 to 26915, inclusive - involving conditions for firearms licenses for sale at retail
- (11) Section 27510 – prohibiting selling supplying, delivering or giving a firearm to someone under 21
- (12) Section 27530 – prohibiting sale or transfer without a serial number
- (13) Section 27540 – providing conditions on dealers for how to deliver firearms
- (14) Section 27545 – requiring licensed dealers to be involved in firearm transactions
- (15) Sections 27555 to 27585, inclusive – involving background checks and prohibiting firearm sales on state property and other specific locations
- (16) Sections 29010 to 29150, inclusive – involving licenses for manufacturing firearms
- (17) Section 29180 – involving manufacturing of firearms and serial numbers

The proscribed *conduct*, not just the weapon, must match the federal deportation ground. The BIA recognized this in *Matter of Ortega-Quezada*, finding that that “gratuitous transfers that do not involve compensation” is not one of the proscribed conducts for the firearm deportability ground, and thus a conviction under 18 U.S.C. § 922(d) did not make the noncitizen deportable.⁴⁰ Specifically, the BIA found that “section 237(a)(2)(C) of the INA[] does not reach gratuitous transfers without compensation.” This analysis may render several other California firearms offenses overbroad.

Multiple California penal statutes, formerly all within CA P.C. § 12020, but now enumerated in multiple different provisions, use identical language to prohibit “possessing/manufacturing/causing to be manufactured/importing/keeping for sale/offering or exposing for sale/**giving/lending**/buying/receiving” as alternative means for violating weapons prohibitions of various kinds.⁴¹ Under *Ortega-Quezada*, these offenses appear overbroad relative to the deportation ground, since they penalize giving and lending, which are analogous to “gratuitous transfers without compensation.”⁴²

What about divisibility? Divisible statutes describe multiple different offenses, even if they are not separated into different sections. When a statute is divisible, immigration courts look at the record of conviction to determine which elements of the statute the defendant actually violated. With the specific firearms offenses listed below, the weapon is divisible, because each different weapon is separately proscribed in separate statutes. But all the statutes in question here list a broad range of conduct with apparently no distinction as to which action is actually committed. Whether the conduct was possessing, manufacturing, or lending the weapon does not appear to matter – except if it was a *sale*, which should be charged specifically. See CalCrim 2500, which instructs juries to find that the defendant did any of the proscribed acts but to specifically identify the proscribed weapon at issue.⁴³ Moreover, the instructions emphasize that the jury must agree on what weapon was involved, but are silent as to whether there must be any agreement on the act taken.⁴⁴ If the charges specify offer or exposure for sale of the weapon, the prosecution must prove intent to sell.⁴⁵

Many of the statutes that use this identical list of prohibited behaviors are for weapons that are not firearms to begin with, such as dirks, billy clubs, nunchucks, etc. However, several statutes do prohibit specific types of guns or devices that are likely otherwise firearms under the federal definition, such as:

P.C. § 24410 cane gun

P.C. § 24510 firearm not immediately recognizable as a gun

⁴⁰ 28 I&N Dec. 598 (BIA 2022) (“Although this provision encompasses a wide variety of conduct, the statute “does not state that ‘any type of firearm offense’ is a basis for deportation.”) quoting *Flores-Abarca v. Barr*, 937 F.3d 473, 480 (5th Cir. 2019).

⁴¹ For a chart of where prior weapons statutes were moved to in current California law, see https://file.lacounty.gov/SDSInter/lasd/172569_nl_11_16_Deputy_Chart.pdf.

⁴² See *Ortega-Quezada*, 28 I&N at 600.

⁴³ CALCRIM 2500. But see *US v. Martinez-Lopez*, 864 F. 3d 1034 (9th Cir. 2017) (holding that drug trafficking under HS § 11352 described different, divisible actus rei when it proscribes transport, sale, give away, etc. or offer to do the same).

⁴⁴ *Id.* (“You may not find the defendant guilty unless all of you agree that the People have proved that the defendant (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent/bought/received) **at least one of these weapons and you all agree on which weapon** (he/she) (possessed/manufactured/ caused to be manufactured/ imported/kept for sale/offered or exposed for sale/gave/lent/bought/received)).”

⁴⁵ *Id.*

P.C. § 24610	undetectable firearm
P.C. § 24710	wallet gun
P.C. § 30210	ammunition with a flechette dart, or bullet with an explosive agent
P.C. § 31500	unconventional pistol
P.C. § 32310	large capacity magazine
P.C. § 32311	large capacity magazine conversion kit ⁴⁶
P.C. § 32900	multiburst trigger activator
P.C. § 33215	short barreled rifle or shotgun
P.C. § 33600	zip gun

Because these offenses are indivisible as to the conduct involved, they are overbroad to the deportation ground, which covers purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, *but does not penalize giving or lending*.⁴⁷ Therefore we have a basis to argue that these are not deportable offenses, even though they cannot use the antique firearm rule. Nonetheless, we don't have caselaw on the divisibility of the actions in these statutes, so this is a better argument for practitioners in removal defense than criminal defenders.

Example: Milo is convicted of P.C. § 33215, involving a short barreled shotgun that is defined as not antique. In removal proceedings, Milo argues that he is not removable because the statute is overbroad to the firearms deportation ground. Milo demonstrates that the statute does not distinguish between “possessing/manufacturing/causing to be manufactured/importing/keeping for sale/offering or exposing for sale/giving/lending/buying/receiving” and is indivisible as to what conduct he was found guilty of. Milo cites the BIA’s decision in *Ortega-Quezada* to demonstrate that there are specific limits to the conduct that falls under the firearm deportation ground. Even if his record of conviction shows that Milo pled guilty to possessing the shotgun, immigration counsel can argue that the categorical approach prevents the court from reviewing the specifics of the conviction on an indivisible statute.

The same analysis may also be true for these offenses as not being aggravated felonies, which include shipping, transporting, possessing, or receiving in interstate commerce, but not giving or lending. **But note that, per CalCrim 2500, sale offenses may be charged separately, so be sure to avoid pleading to sales of these weapons, as a firearm sale for these non-antique weapons will likely be an aggravated felony.**

TAKEAWAYS:

- Removal defense advocates should fight deportability and aggravated felony allegations based on convictions for the above California offenses.
- Criminal defenders, if they must plead to the above offenses, should plead specifically to ‘giving or lending’ to best protect the client.

⁴⁶ Magazines may be considered ammunition, rather than firearms, but these would not match the ammunition-related grounds either.

⁴⁷ See *Matter of Ortega-Quezada*, 28 I&N Dec. 598 (BIA 2022).